

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

## INTRODUCTION

19 Currently pending before this Court is the motion to dismiss Factory Connection  
20 Racing, Inc.’s (“Plaintiff” or “FCR”) complaint filed by Radiate Group, Inc. (“Defendant”).  
21 The motion has been fully briefed by the parties. After careful review of the parties’  
22 submissions, and for the following reasons, this Court **GRANTS** Defendant’s motion to  
23 dismiss.

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## **BACKGROUND**

## I. Procedural Background

3 On June 6, 2012, Plaintiff filed a complaint against Defendant alleging the  
4 following causes of action: (1) breach of contract; (2) breach of the covenant of good faith  
5 and fair dealing; (3) violation of the Miller-Ayala Athlete Agents Act (“Act”); (4) Unjust  
6 Enrichment; and (5) Declaratory Relief. *See* Doc. No. 1. On August 1, 2012, Defendant  
7 filed the instant motion to dismiss Plaintiff’s third cause of action for violation of the Act  
8 pursuant to the Federal Rule of Civil Procedure 12(b)(6) [Doc. No.6].<sup>1</sup> On September  
9 3, 2012, Plaintiff filed a response in opposition to the motion, including a request for  
10 leave to amend. *See* Doc. No. 11. On September 10, 2012, Defendant filed a reply. *See*  
11 Doc. No. 14.

12 After a careful review of the parties' submissions, and for the following reasons, this  
13 Court **GRANTS** Defendant's motion to dismiss.

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<sup>18</sup>       <sup>1</sup>In connection with the motion to dismiss, Defendant filed a request for judicial  
<sup>19</sup> notice of the following five Exhibits: (A) California Secretary of State Athlete Agent  
<sup>20</sup> Disclosure Form; (B) Assembly Bill No. 1987, as originally introduced on January 3, 1996;  
<sup>21</sup> (C) Assembly Bill No. 1987, as amended on March 20, 1996; (D) California Senate  
<sup>22</sup> Judiciary Committee's analysis of the Uniform Athlete Agents Act, Senate Bill No. 1098,  
as amended on April 5, 2010, in the 2009-10 Regular Session; and (E) Minute Order  
issued by the Superior Court of California, County of San Diego, North County in Case  
No. 37-2010-00058757-CU-MC-NC. *See* Doc. No. 7. This Court may take judicial  
notice of an adjudicative fact "not subject to reasonable dispute because it can be . . .  
accurately and readily determined from sources whose accuracy cannot be reasonably  
questioned." *See* Fed. R. Evid. 201; Grason Elec. Co. v. Sacramento Mun. Util. Dist., 571  
F. Supp. 1504, 1521 (E.D. Cal. 1983). In a preclusion context, a federal court may  
"[take] judicial notice of a state court decision and the briefs filed in that court to  
determine if an issue was raised and decided by the state court for *res judicata* purposes."  
Manufactured Home Cmtys. Inc. v. City of San Jose, 420 F.3d 1022, 1037 (9th  
Cir.2005); *see also* Holder v. Holder, 305 F.3d 854, 866 (9th Cir.2002) (taking judicial  
notice of a California Court of Appeal opinion "and the briefs filed in that proceeding and  
in the trial court" for the purposes of ruling on issue preclusion). This Court declines to  
take judicial notice of Exhibits A-D because they are not the proper subject of judicial  
notice, *i.e.* of adjudicative facts. This Court also declines to take judicial notice of Exhibit  
E, the Superior Court Minute Order, because Defendant's motion to dismiss is not based  
on issue and/or claim preclusion. Therefore, Defendant's request for judicial notice is  
**DENIED.**

1       **II. Factual Background<sup>2</sup>**

2       FCR, a manufacturer of performance motorcycle parts and operator of a  
 3 professional motorcycle racing team, alleges in its complaint that, on July 26, 2006, the  
 4 parties entered into a one-year written Representation Agreement (“Agreement”). Under  
 5 the Agreement, Defendant, a marketing agency, agreed to negotiate and solicit sponsorship  
 6 opportunities on behalf of FCR. *See Doc. No. 1 at 2.* FCR appointed Defendant as its  
 7 “exclusive sales agency for the purpose of acquiring all non-endemic (outside the  
 8 motorcycle industry) sponsorships” for FCR’s teams in an “exclusive, worldwide basis for  
 9 the term hereof.” *See Doc. No. 1-2 at 2.* Plaintiff is required to pay commission fees,  
 10 during and after the expiration of the term of the Agreement, from any sponsorship that  
 11 Defendant secures for Plaintiff. *Id. at 3.* Plaintiff alleges that on July 17, 2007,  
 12 Defendant and FCR agreed in writing to extend the Agreement until July 26, 2008. *See*  
 13 Doc. No. 1 at 3. In 2009, Defendant became the agent for one of FCR’s motocross racers,  
 14 Trey Canrad (“Canrad”). *See Doc. No. 1 at 5.* FCR advised Defendant that because of  
 15 its representation of Canrad, Defendant created a conflict of interest, and as such, no  
 16 further commissions or obligations are owed to Defendant. *Id. at 6.* Plaintiff maintains  
 17 that the Agreement is void and unenforceable because Defendant did not comply with the  
 18 Act by failing to file a disclosure statement with the California Secretary of State and post  
 19 a surety bond in connection with its relationship with FCR. *Id. at 4-6.* It is undisputed  
 20 that Defendant did not at any relevant time satisfy the requirements of the Act. *See Doc.*  
 21 No. 6-1 at 8.

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27       <sup>2</sup> These background facts are taken from Plaintiff’s complaint, the operative  
 28 pleading here, and are assumed true for purposes of the instant motion. *See Thompson*  
*v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002).

## DISCUSSION

2 Defendant moves to dismiss Plaintiff's complaint pursuant to Rule 12(b)(6) of the  
3 Federal Rules of Civil Procedure. [Doc. No. 6].

4 || I. Legal Standard

5 A motion to dismiss under Rule 12(b)(6) tests the sufficiency of the complaint.  
6 Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal is warranted under  
7 Rule 12(b)(6) where the complaint lacks a cognizable legal theory. Robertson v. Dean  
8 Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984); see Neitzke v. Williams, 490  
9 U.S. 319, 326 (1989) (“Rule 12(b)(6) authorizes a court to dismiss a claim on the basis  
10 of a dispositive issue of law.”). Alternatively, a complaint may be dismissed where it  
11 presents a cognizable legal theory yet fails to plead essential facts under that theory.  
12 Robertson, 749 F.2d at 534. While a plaintiff need not give “detailed factual allegations,”  
13 he must plead sufficient facts that, if true, “raise a right to relief above the speculative  
14 level.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 545 (2007).

15 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,  
16 accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal,  
17 129 S.Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 547). A claim is facially  
18 plausible when the factual allegations permit “the court to draw the reasonable inference  
19 that the defendant is liable for the misconduct alleged.” Id. In other words, “the non-  
20 conclusory ‘factual content,’ and reasonable inferences from that content, must be  
21 plausibly suggestive of a claim entitling the plaintiff to relief. Moss v. U.S. Secret Service,  
22 572 F.3d 962, 969 (9th Cir. 2009). “Determining whether a complaint states a plausible  
23 claim for relief will ... be a context-specific task that requires the reviewing court to draw  
24 on its judicial experience and common sense.” Iqbal, 129 S.Ct. at 1950.

25 In reviewing a motion to dismiss under Rule 12(b)(6), the court must assume the  
26 truth of all factual allegations and must construe all inferences from them in the light most  
27 favorable to the nonmoving party. Thompson v. Davis, 295 F.3d 890, 895 (9th Cir.  
28 2002); Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996). However,

1 legal conclusions need not be taken as true merely because they are cast in the form of  
 2 factual allegations. Ileto v. Glock, Inc., 349 F.3d 1191, 1200 (9th Cir. 2003); Western  
 3 Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). When ruling on a motion  
 4 to dismiss, the Court may consider the facts alleged in the complaint, documents attached  
 5 to the complaint, documents relied upon but not attached to the complaint when  
 6 authenticity is not contested, and matters of which the Court takes judicial notice. Lee  
 7 v. City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001). If a court determines that  
 8 a complaint fails to state a claim, the court should grant leave to amend unless it  
 9 determines that the pleading could not possibly be cured by the allegation of other facts.  
 10 See Doe v. United States, 58 F.3d 494, 497 (9th Cir. 1995).

## 11 II. Analysis

12 Defendant argues that Plaintiff lacks standing to pursue a claim under the Act.<sup>3,4</sup>  
 13 See Doc. No. 6-1. Specifically, Defendant argues that Plaintiff lacks standing because it  
 14 has not alleged sufficient facts to establish FCR has been adversely affected as a result of  
 15 Defendant's violation of the Act. See Doc. No. 6-1 at 15, 18-20. Defendant notes that  
 16 while the complaint alleges that Defendant violated the Act by failing to comply with its  
 17 disclosure obligations and by failing to obtain a surety bond, FCR has not alleged how it  
 18 or any individual athlete has been adversely affected by Defendant's violation of the Act.

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 20 <sup>3</sup>Because this Court ultimately finds that Plaintiff does not have the requisite  
 21 standing to bring the instant claim under the Act, this Court will not address Defendant's  
 arguments regarding Plaintiff's failure to state a claim.

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 23 <sup>4</sup>Defendant maintains it could not find any binding authority on the issues  
 24 presented in its motion to dismiss. See Doc. No. 6-1 at 17. Defendant, however, presents  
 25 both an unpublished San Diego Superior Court Minute Order and a Texas Arbitration  
 26 Award as persuasive authorities. See Doc. Nos. 7-5 and 6-2. In opposition, Plaintiff  
 27 argues Defendant improperly cited to unpublished decisions because they have no  
 28 precedential value. See Doc. No. 11 at 21-22 (citing Ninth Circuit Rule 36-  
 3)(“Unpublished dispositions and orders of this Court are not precedent.”). Defendant,  
 in reply, argues that to the extent that Rule 36-3 is applicable, Defendant complied  
 because the Rule expressly permits courts to cite “[u]npublished dispositions and orders  
 of this Court issued on or after January 1, 2007.” See Doc. No. 14 at 8-9 (citing Ninth  
 Circuit Rule 36-3(b)). Although the authority Defendant cites is not binding precedent,  
 this Court finds they have persuasive value. Therefore, this Court may rely upon these  
 unpublished decisions as persuasive authority. See Nuh Nhuoc Loi v. Scribner, 671 F.  
 Supp. 2d 1189, 1201, n. 10 (S.D. Cal 2007); Ortiz v. Accredited Home Lenders, Inc., 639  
 F. Supp. 2d 1159, 1167, n.1 (S.D. Cal. 2009).

1     *See Doc. No. 6-1 at 15, 18-20 (citing Cal. Bus. & Prof. Code § 18897.8(a)).* Defendant  
 2 points out that the complaint alleges FCR suffered damages due to Defendant's  
 3 representation of Canrad. *See Doc. No. 6-1 at 19.* Defendant argues, however, that its  
 4 representation of Canrad does not constitute a violation of the Act. *Id.* Defendant,  
 5 therefore, claims that based on the allegations in the complaint, FCR does not have  
 6 standing to bring this action because it has not suffered any injury as a result of the  
 7 alleged violation. *See Doc. No. 6-1 at 19-10.*

8                 In opposition, Plaintiff argues that Defendant's failure to comply with the Act  
 9 adversely affected FCR because it was unable to determine whether Defendant was  
 10 simultaneously representing competitors seeking the same motorsport sponsorships. *See*  
 11 Doc. No. 11 at 20. Plaintiff contends that based on Defendant's failure to comply with  
 12 the Act, Plaintiff paid Defendant \$808,683.56 in commissions that it was not entitled to  
 13 receive. *Id.* Plaintiff also contends that the Act is a strict liability statute, and that under  
 14 section 18897.8(b), even if there are no actual damages, a plaintiff may recover \$50,000,  
 15 as well as punitive damages, fees and costs. *See Doc. No. 11 at 20.*

16                 In reply, Defendant argues that the alleged "adverse effect" –that FCR was unable  
 17 to determine whether Defendant was simultaneously representing competitors seeking the  
 18 same sponsorships– show that FCR does not have a viable claim under the Act because  
 19 FCR's assertion is a hypothetical about Defendant possibly representing a competitor. *See*  
 20 Doc. No. 14 at 4. Defendant argues that FCR's assertion at most gives rise to a  
 21 theoretical breach of contract claim. *Id.* In addition, Defendant notes that FCR does not  
 22 allege how it suffered because Defendant did not secure a surety bond pursuant to the Act.  
 23 *Id.*

24                 Section 18897.8(a) states: Any professional athlete ... or any other person may  
 25 bring a civil action for recovery of damages from an athlete agent, if that professional  
 26 athlete ... or that other person is adversely affected by the acts of the athlete agent or of  
 27 the athlete agent's representative or employee in violation of this chapter. In regards to  
 28 damages, section 18897.8(b) states: A plaintiff that prevails in a civil action brought

1 under this section may recover actual damages, or fifty thousand dollars (\$50,000),  
 2 whichever is higher; punitive damages; court costs; and reasonable attorneys' fees.

3       Under section 18897.8(a), Plaintiff must allege it was adversely affected by  
 4 Defendant's violations of the Act in order to bring an action pursuant to the Act. As such,  
 5 the Act is not a strict liability statute. Furthermore, this Court finds Plaintiff's argument  
 6 that FCR was damaged because it paid Defendant \$808,683.56 in commissions that it was  
 7 not entitled to receive does not establish actual damage resulting from Defendant failing  
 8 to file a disclosure statement and to secure a surety bond pursuant to the Act. While  
 9 Plaintiff alleges that because Defendant failed to file a disclosure statement, it could not  
 10 determine if Defendant was representing competitors, Plaintiff does not allege that  
 11 Defendant was representing competitors or that it was damaged by Defendant's  
 12 representation of a competitor. Plaintiff also alleges that FCR paid Defendant a  
 13 commission that Defendant was not entitled to receive, however, Plaintiff does not state  
 14 that such a payment would not have been made but for Defendant's violation of the Act.  
 15 Therefore, Plaintiff has not alleged facts sufficient to establish it has been adversely  
 16 affected by Defendant's failure to comply with the Act. Thus, this Court finds that  
 17 Plaintiff lacks standing to pursue a claim under the Act, and accordingly, **GRANTS**  
 18 Defendant's motion to dismiss. Because it is possible for Plaintiff to allege sufficient facts  
 19 to establish it has been adversely affected as a result of Defendant's violation of the Act,  
 20 Plaintiff's claim is **DISMISSED WITHOUT PREJUDICE** and **WITH LEAVE TO**  
 21 **AMEND.**<sup>5</sup>

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27           <sup>5</sup>Defendant also requests that this Court award Defendant fees pursuant to the  
 28 Agreement should it prevail on its motion to dismiss. *See* Doc. No. 6-1 at 20. Because  
 Plaintiff's claim under the Act is dismissed without prejudice, Defendant's request for fees  
 is premature, and thus, **DENIED**.

## **CONCLUSION AND ORDER**

Based on the foregoing, IT IS HEREBY ORDERED that:

1. Defendant's motion to dismiss [Doc. No. 6] is **GRANTED** and Plaintiff's claim under the Act is **DISMISSED WITHOUT PREJUDICE** and **WITH LEAVE TO AMEND**; and
  2. Plaintiff may file an amended complaint that cures the deficiencies outlined herein **no later than April 22, 2013**.

Dated: March 21, 2013

JOHN A. HOUSTON  
United States District Judge